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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/589,741

08/16/2006

Michael J. Sailor

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24978 7590 02/28/2011

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EXAMINER

ANDLER, MICHAEL S

ART UNIT

PAPER NUMBER

2876

MAIL DATE

DELIVERY MODE

02/28/2011

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/589,741	Applicant(s) SAILOR ET AL.	
	Examiner Michael Andler	Art Unit 2876	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 10 January 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ They raise the issue of new matter (see NOTE below);
- (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: _____.
- Claim(s) objected to: _____.
- Claim(s) rejected: 18,20-24 and 26-42.
- Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☒ Other: See Continuation Sheet.

/Michael G Lee/
Supervisory Patent Examiner, Art Unit 2876

Continuation of 11. does NOT place the application in condition for allowance because:

Applicant's arguments filed on 10 January 2010 have been considered but are not persuasive.

Regarding the provisional double patenting rejection of claim 18, applicant has argued that claims 51-52 of application number 10/503,217 "do not disclose or suggest a composite waveform formed by the addition of sine components". The examiner respectfully disagrees and would point out that claims 51-52 of the conflicting application recites the limitation of "varying the etching current density waveform...wherein the current density waveform contains one or more sinusoidal frequency components" while the instant application recites "varying etching conditions... (by) applying an etching waveform formed by the addition of at least two separate sine components". Applicant's argument that a varied waveform "contains two sine components" is not equivalent to "formed by the addition of two sine components" is not persuasive.

The examiner would also point out that the language of claims 51-52 further supports the examiner's argument that claim 18 of the instant application is anticipated by Sailor et al. (WO 03/067231) since the support that applicant relies on for the claim appears to refer to same portions of the reference as pointed out by the examiner in the Office Action dated XXXX 2010. The examiner would further point to page 8, which discloses etching "with a periodic variance of etching conditions, such that the refractive index in the material varies in a sinusoidal (or apodised sinusoidal) function".

Regarding applicant's declaration under 37 C.F.R. 1.131, the examiner has not considered the declaration since it was not timely submitted. Applicant's submission is after final but before or on the same date of filing an appeal, but does not include a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented in compliance with 37 CFR 1.116(e) as required by MPEP 715.09(C). Furthermore, the examiner would respectfully point out that, although not considered, portions of applicant's submission are illegible, particularly regarding pages 4 and 5.

Applicant's declaration further has not been considered since it was not accompanied by a terminal disclaimer to overcome the double patenting rejection as argued above. Applicant is reminded that a timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Claims 18, 20-24 and 26-42 remain anticipated or rendered obvious by the prior art as previously argued in the Final Office Action dated 5 October 2010..

Continuation of 13. Other:

The examiner has entered the amendment filed on 10 January 2011 since it merely presents arguments, however, the declaration under 37 C.F.R. 1.131 has not been entered for the reason checked above in paragraph 8.